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265 NLRB No. 74

D--9514
Spanish Fork and
Price, UT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

C & E DISTRIBUTING,
INC./CARBON-EMERY
ENTERPRISES, INC.

and

Case 27-CA-6614

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL NO. 222

DECISION AND ORDER

Upon a charge filed on March 10, 1980, and an amended charge on October 17, 1980, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, herein called the Union, and duly served on C & E Distributing, Inc./Carbon-Emery Enterprises, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board by the Regional Director for Region 27, issued a complaint and notice of hearing on April 23, 1980, and by the Acting Regional Director for Region 27, issued an amended complaint on August 12, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as

amended. Copies of the charges and complaints and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the amended complaint alleges in substance that Respondent violated Section 8(a)(1) and (5) by failing to abide by certain provisions of the collective-bargaining agreement with the Union and by ceasing business without affording the Union an opportunity to bargain about the effects of the cessation of business.

Respondent failed to answer the amended complaint, and, on September 9, 1982, the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 14, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The

> respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The amended complaint and notice of hearing served on Respondent specifically states that, unless an answer to the complaint was filed within 10 days from the service thereof, ''all of the allegations in the Amended Complaint shall be deemed to be admitted to be true and may be so found by the Board.'' Respondent failed to file an answer, and thus the allegations of the complaint must be deemed admitted as true. No good cause to the contrary having been shown, in accordance with Section 102.20 of the Board's Rules set out above, the allegations in the amended complaint against Respondent are deemed admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

Findings of Fact

I. The Business of Respondent

On or about December 31, 1979, Carbon-Emery Enterprises, Inc., a Utah corporation, merged with C & E Distributing, Inc., a Utah corporation. As the surviving entity, Carbon-Emery Enterprises, Inc., since that date and continuing until July 31, 1980, was engaged in the same business operations, at the same location, selling the same product to substantially the same

customers, with the same ownership, and had as a majority of its employees, individuals who were previously employees of C & E Distributing, Inc.

By virtue of the acts and conduct described above, Respondent C & E Distributing, Inc., and Respondent Carbon-Emery Enterprises, Inc., are, and have been at all times material herein, alter egos and a single employer within the meaning of the Act.

Respondent at all times material herein has been a corporation duly organized under and existing by virtue of the laws of the State of Utah, and maintained its principal office and place of business at Spanish Fork, Utah. At all times material herein it has been engaged in Spanish Fork, Utah, and Price, Utah, in the processing of milk and distribution of dairy products. In the course and conduct of its business operations Respondent annually sold and shipped goods and materials valued in excess of $50,000, directly to other enterprises located within the State of Utah, including Safeway and Albertson's, which each annually purchases and receives goods valued in excess of $50,000 directly from points and places outside the State of Utah. In the course and conduct of its business operations Respondent annually derived gross revenue in excess of $500,000, and made purchases of goods and materials valued in excess of $5,000 directly from points and places outside the State of Utah.

Respondent at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

1. At all times material herein, the following named person occupied the position set opposite his name, and has been, and is now, an agent of Respondent, acting on its behalf, and is a supervisor within the meaning of Section 2(11) of the Act:

Thomas Blonquist---President

2. All employees employed by Respondent including route salesmen, drivers and plant employees, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. On or about April 1979, a majority of the employees of Respondent in the unit described above designated or selected the Union as their representative for the purposes of collective bargaining with Respondent.

4. Since on or about April 1979, and all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees described above, and since April 1979, the Union has been recognized as such representative by Respondent. Recognition has been embodied in a collective-bargaining agreement which was effective by its terms until June 1, 1980.

5. At all times since April 1979, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. Since on or about September 10, 1979, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of all the employees of Respondent in the unit described above.

7. Commencing on or about September 10, 1979, and at all times thereafter, Respondent engaged in the following conduct: Respondent has failed and refused to abide by the collective-bargaining agreement's dues-checkoff provision; it has failed and refused to abide by the collective-bargaining agreement's health and welfare and pension plan provisions by unilaterally discontinuing payments to these funds; and it has failed and refused to abide by the collective-bargaining agreement's vacation and holiday provisions.

Furthermore, on or about July 31, 1980, Respondent totally ceased doing business without having afforded the Union an opportunity to negotiate and bargain with respect to the effects of such cessation of business.

We find that by engaging in the conduct described in paragraph 7, above, Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) and refused to bargain with the Union in violation of Section 8(a)(5).

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the purposes and policies of the Act.

We have found that Respondent, in violation of Section 8(a)(5) and (1) of the Act, failed to abide by certain provisions of the collective-bargaining contract effective by its terms until June 1, 1980. To remedy this violation, we shall order Respondent to make the payments it failed to make as required under the health and welfare and pension plan provisions and the vacation and holiday provisions of the contract, from the date it commenced the unfair labor practices until the end of the

contract.[1] We shall also order Respondent to remit to the Union the dues, if any, that it withheld from employees' paychecks and did not transmit to the Union, with interest on the amount, if any, to be computed in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

We have found also that Respondent unlawfully failed to afford the Union an opportunity to bargain about the effects of its cessation of business, and we shall order Respondent to bargain with the Union concerning the effects of cessation on all bargaining unit employees. To assure meaningful bargaining, we shall add to the bargaining order a limited backpay order, designed to make the employees whole for losses suffered as the result of Respondent's failure to bargain, and to recreate to some degree a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for Respondent. Accordingly, we shall order Respondent to bargain with the Union, upon request, about the effects on bargaining

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[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Company, 240 NLRB 1213 (1979).

unit employees of the cessation of Respondent's operations, and to pay the employees amounts at the rates of their normal wages when last in Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the cessation on bargaining unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any employee exceed the amount the employee would have earned as wages from July 31, 1980, the date Respondent terminated its operations, to the time the employee secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall the sum be less than the employees would have earned for a 2-week period at the rates of their normal wages when last in Respondent's employ.[2] Interest on all such sums shall be paid in the manner prescribed in Florida Steel Corporation, supra.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

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[2] See Merryweather Optical Company, supra; Interstate Tool Co., Inc., 177 NLRB 686 (1969); Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc., 170 NLRB 389 (1968).

Conclusions of Law

1. C & E Distributing Inc./Carbon-Emery Enterprises, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent including route salesmen, drivers and plant employees, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about April 1979, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 10, 1979, to abide by certain provisions of the applicable collective-bargaining agreement with the Union, and by ceasing business on or about July 31, 1980, without having afforded the Union an opportunity to bargain about the effects of the cessation, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering

with, restraining, and coercing, employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, C & E Distributing, Inc./Carbon-Emery Enterprises, Inc., Spanish Fork and Price Utah, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to abide by the dues-checkoff provision of the collective-bargaining agreement effective by its terms until June 1, 1980.

(b) Failing and refusing to abide by the health and welfare and pension plan provisions of that collective-bargaining agreement by unilaterally discontinuing payments to those funds.

(c) Failing and refusing to abide by the vacation and holiday provisions of that collective-bargaining agreement.

(d) Failing and refusing to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, with respect to the effect on its employees of its decision to cease operations.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, with respect to the effect on its employees of its decision to cease operations, and reduce to writing any agreement reached as a result of such bargaining.

(b) Pay the terminated employees for the period and in the manner set forth in the section of this Decision entitled ''The Remedy.''

(c) Make the payments it failed to make as required under the health and welfare and pension plan provisions of the collective-bargaining contract effective by its terms until June 1, 1980, and the vacation and holiday provisions of that contract, from the date it ceased to abide by the contract until the expiration of the contract.

(d) Remit to the Union the dues, if any, that it withheld from its employee's paychecks and did not transmit to the Union, plus interest, as set forth in the section of this Decision entitled ''The Remedy.''

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records,

social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(f) Mail an exact copy of the attached notice marked ''Appendix'' [3] to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, and to all employees who were terminated at the time it ceased operations. Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's authorized representative, shall be mailed immediately upon receipt thereof, as hereinabove directed.

(g) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. December 2, 1982

John R. Van de Water, Chairman

John H. Fanning, Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to observe provisions concerning checkoff, health and welfare and pension plans, and vacation and holidays that were required before its expiration by our collective-bargaining agreement effective by its terms until June 1, 1980.

WE WILL NOT fail and refuse to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, with respect to the effect of our decision to cease operations upon our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make the payments we failed to make as required under the health and welfare and pension plan provisions of the collective-bargaining contract effective by its terms until June 1, 1980, and the vacation and holiday provisions of that contract.

WE WILL remit to the Union the dues, if any, that we withheld from employees' paychecks and did not transmit to the Union, plus interest.

WE WILL pay the unit employees who were terminated when we ceased operations normal wages for a period specified by the National Labor Relations Board, plus interest.

WE WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, with respect to the effect on bargaining unit employees of our decision to cease operations, and reduce to writing any agreement reached as a result of such bargaining. The bargaining unit is:

All employees including route salesmen, drivers and plant employees, but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

C & E DISTRIBUTING, INC./CABON-EMERY ENTERPRISES, INC.

(Employer)

Dated ---------- By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303--837--3553.